

1 UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF NEW JERSEY

3  
4 **IN RE: VALSARTAN PRODUCTS**  
**LIABILITY LITIGATION**

**CIVIL ACTION NUMBER:**  
**19-md-02875-RBK-SAK**  
**CASE MANAGEMENT CONFERENCE**  
**via TELEPHONE CONFERENCE**

6  
7 Mitchell H. Cohen Building & U.S. Courthouse  
8 4th & Cooper Streets  
9 Camden, New Jersey 08101  
February 28, 2022  
Commencing at 10:02 a.m.

10 **B E F O R E:**

**THE HONORABLE ROBERT B. KUGLER**  
**UNITED STATES DISTRICT JUDGE**

11 **THE HONORABLE THOMAS I. VANASKIE (RET.)**  
12 **SPECIAL MASTER**

13 **A P P E A R A N C E S:**

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**A P P E A R A N C E S (Continued):**

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**ALSO PRESENT:**

SPECIAL MASTER GREGORY M. SLEET

SPECIAL MASTER LAWRENCE R. STENGEL

LORETTA SMITH, ESQUIRE

Judicial Law Clerk to The Honorable Robert B. Kugler

Larry MacStravic, Courtroom Deputy

1 (PROCEEDINGS held telephonically before The Honorable  
2 Robert B. Kugler, United States District Judge, and The  
3 Honorable Thomas I. Vanaskie (Ret.), Special Master, at 10:02  
4 a.m.)

5 JUDGE VANASKIE: All right. It's two minutes after  
6 10:00. And I know things have slowed down.

7 Do we have a court reporter on the phone?

8 COURT REPORTER: Yes, Your Honor. It's Ann Marie  
9 Mitchell.

10 JUDGE VANASKIE: Good morning. Thank you for taking  
11 care of this call today.

12 And if we can get started, this part of the call  
13 should not last very long. Again, follow the protocol that we  
14 have in place. If you're not speaking, please mute your  
15 phone, and identify yourself when you are speaking.

16 Who will be addressing the matters for today's call  
17 for the plaintiffs?

18 MR. SLATER: Hi, Judge. It's Adam Slater. I think  
19 it will just be issue by issue.

20 JUDGE VANASKIE: All right. Very well. As in the  
21 past.

22 Who will be the principal spokesperson for the  
23 defense?

24 MR. GOLDBERG: Good morning, Your Honor. This is  
25 Seth Goldberg for the defense and the ZHP parties. And the

1 same is true with defendants. We will take it issue by issue.

2 JUDGE VANASKIE: Very well. Good morning,  
3 Mr. Goldberg.

4 MR. GOLDBERG: Good morning.

5 JUDGE VANASKIE: All right. I have received your  
6 agenda letters and plaintiff's amended agenda letter. Thank  
7 you for that clarification.

8 I take it that with respect to the scheduling of the  
9 Daubert hearing, plaintiffs are of the view that they can have  
10 their witnesses all on Wednesday of this week, March 2nd.

11 Is that correct, Mr. Slater?

12 MR. SLATER: Yes, Your Honor, that's correct.

13 JUDGE VANASKIE: All right. Very well.

14 And I think on the question of the schedule and the  
15 process, that's really a matter to discuss with Judge Kugler,  
16 who will join our call shortly. So I don't intend to do  
17 anything else with respect to the scheduling of the Daubert  
18 hearings and the process that is going to be followed in the  
19 hearings.

20 I did want to ask, it seems to me -- you've raised  
21 this issue with respect to the data breach at Marker Group,  
22 but there's really nothing for us to be concerned about at the  
23 present time. Is that correct?

24 MR. STANOCH: Your Honor, this is David Stanoch for  
25 the plaintiffs. I can address this briefly.

1 JUDGE VANASKIE: Very well.

2 MR. STANOCH: Your Honor is correct, we're not asking  
3 for any ruling from Your Honor at this time. We did want to  
4 alert you to it. And generally speaking, we did want to  
5 discuss it, because we think certainly short of an order, we  
6 should be able to agree to a few basic parameters that  
7 defendants could take under advisement from Your Honor.  
8 Simply, as our letter says, you know, we had to learn about  
9 this ourselves for a number of our clients', you know,  
10 personal information that was subject to the breach. It looks  
11 like defendants got a notification from their vendor, Marker  
12 Group, about this weeks ago, and it wasn't until we started  
13 asking questions about it that we even saw the letter or heard  
14 from defendants about it three weeks later.

15 So we simply hope going forward that number one,  
16 defendants ensure that their vendor, Marker Group, is properly  
17 investigating the breach, because we're not the contracting  
18 party. Number two, that they ensure that the breach is fixed,  
19 the vulnerability, especially for our clients. And number  
20 three, that they simply promptly inform us, you know, in a day  
21 or two, not three plus weeks, about any material updates or  
22 developments, again, because they're the contracting party  
23 with their vendor. We can certainly talk to Marker Group, but  
24 we cannot really oblige them as a customer and contracting  
25 party to do anything.

1 JUDGE VANASKIE: All right. Who is addressing this  
2 issue for the defense?

3 MS. LOCKARD: Good morning, Your Honor, it's Victoria  
4 Lockard from Greenberg Traurig, and I'll be addressing this  
5 for the defendants.

6 As we stated in our letter, I and Greenberg Traurig  
7 first learned of this on February 2nd. We do use Marker in a  
8 number of litigations. Obviously this issue goes far beyond  
9 valsartan. You know, my understanding is there were  
10 approximately 88 individuals in valsartan who were involved  
11 and many others in other litigations. Our firm has been in  
12 discussions with Marker. We're obviously taking it very  
13 seriously and evaluating them as a vendor, so I do want to  
14 give assurances to both to the plaintiffs and to the Court  
15 that that is being done at the highest levels of my firm and  
16 through our information security folks.

17 You know, however, the information that I think  
18 plaintiffs seek really is better supplied by Marker who knows  
19 more about the details of this breach, you know, when and how  
20 it occurred. And I, you know, don't think the best avenue of  
21 information is for that information to come through, you know,  
22 Marker to my information security team, to me, to plaintiffs.  
23 I really think direct communication is best. And I've offered  
24 multiple times to make myself available and to set up a call  
25 with Marker, including yesterday. I emailed plaintiffs that

1 Marker is available on Thursday afternoon.

2           So we're working, I think, to try to get the  
3 information that plaintiffs need and want. You know, I also  
4 want to say, you know, to the extent that there's any  
5 suggestion that we are hiding or keeping information from  
6 plaintiffs, you know, I certainly would not agree with that  
7 whatsoever.

8           Just as a point of clarity, there was a class action  
9 litigation filed against Marker back in January by one of the  
10 firms that sits on the plaintiffs' steering committee in this  
11 litigation. So plaintiffs as a whole certainly knew about  
12 this, or their leadership did, you know, well before I or my  
13 firm did.

14           And likely, to be honest, you know, there -- you  
15 know, certainly I can say there was some obligation for  
16 plaintiffs to advise us on the defendants when they learned  
17 about this. But, you know, I don't want to stir the pot in  
18 that regard.

19           I think at this point the parties just need to work  
20 together to get the information. We'll be happy to be  
21 collaborative on that, but I don't think this is proper  
22 subject matter for an order that, you know, dictates that the  
23 defendants are to do -- you know, to supply or do anything  
24 along the lines that Mr. Stanoch has suggested.

25           So I'll stop there. I think I've made a record on

1 that. And I'm happy to answer any questions from the Court.

2 JUDGE VANASKIE: Mr. Stanoch, what is your view with  
3 respect to having a direct communication with Marker Group as  
4 suggested by Ms. Lockard?

5 MR. STANOCH: Your Honor, we believe that's  
6 appropriate and that's fine. Mr. Lockard's correct, she  
7 emailed us yesterday, Sunday, about a potential call we can  
8 have. We're fine to proceed that route, but of course we  
9 think it should proceed in tandem or in parallel with  
10 defendants' own efforts. And it sounds like defendants are  
11 taking some efforts on their own. I would just ask that, you  
12 know, that we be kept abreast of their own efforts with their  
13 own vendor while we attempt to reach out as well.

14 JUDGE VANASKIE: All right. Ms. Lockard?

15 MS. LOCKARD: Well, Your Honor, we're happy to keep  
16 plaintiffs informed generally. But in terms of my firm's  
17 communications with Marker, you know, what types of audits  
18 they're doing, this goes well beyond valsartan, you know. I  
19 don't think it's appropriate for, you know, plaintiffs to  
20 embed themselves in our discussions with Marker or assurances,  
21 you know, requiring us to provide assurances of that nature.

22 I mean, we can certainly pass on, you know, in  
23 general terms what we've learned. And, you know, we have  
24 learned that Marker has made strides in terms of beefing up  
25 their security, you know, and they've retained a consultant



1 and so forth and so on.

2 But, you know, I think those efforts, which are the  
3 subject of our discussions to ensure they're doing their job,  
4 you know, that is something that needs to be discussed I think  
5 with plaintiffs directly as well. Plaintiffs can ask whatever  
6 questions they want. But I do not think it's appropriate that  
7 my firm be required to update plaintiffs with respect to  
8 discussions with one of our vendors that we use, you know,  
9 beyond this litigation generally.

10 JUDGE VANASKIE: All right. Yes. I will not impose  
11 any freestanding obligation on the part of the defense to  
12 inform plaintiffs' counsel about their communications with  
13 Marker Group that concern matters outside this litigation.

14 I do encourage plaintiffs to have that direct  
15 discussion with the Marker Group that has been offered. And  
16 then I would expect that there would be periodically updates  
17 on where the investigation stands right now. But I don't  
18 think it's appropriate at this point in time to enter any  
19 order imposing any obligation on the part of the defense to  
20 keep plaintiffs' counsel abreast of developments with respect  
21 to what I imagine is an investigation that extends far beyond  
22 this particular case and impacts a number of individuals that  
23 are not part of this litigation.

24 So I think all I can indicate right now is that the  
25 plaintiffs take advantage of the opportunity to have direct

1 communication with Marker Group and learn for themselves what  
2 is being done in terms of the breach having been closed, that  
3 the breach is not ongoing, and what steps Marker Group is  
4 proposing to take to protect the individuals adversely  
5 affected.

6 So I think that's all we can accomplish with respect  
7 to that particular matter now.

8 The next issue that I had on the agenda was the  
9 request for dismissal of CVS from the medical monitoring  
10 master complaint.

11 And who will be addressing this issue on behalf of  
12 the plaintiffs?

13 MR. STANOCH: Your Honor, this is David Stanoch  
14 again. I believe I will.

15 JUDGE VANASKIE: All right. Very well.

16 MR. STANOCH: Judge, you'll recall, we had a very  
17 similar conversation about this the last CMC or two ago, about  
18 different named plaintiffs and defendants' request for  
19 dismissal of their claims.

20 We received CVS's request. We're evaluating the  
21 request. With all of the prior requests, we've evaluated them  
22 thoroughly and in good faith. And I think in almost every  
23 case, if not every case, we have ultimately agreed to dismiss  
24 named plaintiffs or claims.

25 We'll approach this request the same way. There's no

1 reason for defendants or anyone to think we will not,  
2 especially given our track record on this. We have no desire  
3 for inefficiency for the parties or the Court either, but we  
4 don't think it's appropriate for any action by Your Honor at  
5 this time. As we discussed at the last CMC, you know, we  
6 cannot be coerced in a CMC discovery setting to dismiss claims  
7 or parties on merits when at worst case, this is a summary  
8 judgment or class cert briefing issue which can be evaluated  
9 on the purportedly disputed facts at that time.

10 But again, we will continue to look into and we'll  
11 get back to them. So if we can agree to something beforehand,  
12 we will, but otherwise, we don't think there is any action  
13 that should be taken at this time.

14 JUDGE VANASKIE: Very well. Thank you, Mr. Stanoch.  
15 Who is addressing this issue for the defense?

16 MS. KAPKE: Kara Kapke for CVS, Your Honor.

17 JUDGE VANASKIE: Very well.

18 MS. KAPKE: I appreciate the opportunity to be heard.

19 I think it goes without saying that being a party to  
20 medical monitoring class action is a lot of work. Above and  
21 beyond just being a defendant in the economic loss class  
22 action and the personal injury action, there are several  
23 experts offering opinions specific to the medical monitoring  
24 class. There will be briefing specific to whether the medical  
25 monitoring class can or should be certified. But there is not

1 a single plaintiff who alleges that he or she has a medical  
2 monitoring claim against CVS.

3 So we're left here wondering why should CVS be forced  
4 to defend itself in the medical monitoring cause of action.  
5 We're not trying to make a summary judgment argument, and I  
6 respect and appreciate and understand plaintiffs' concerns  
7 about premature merits arguments. But that's not why we're  
8 here.

9 If plaintiffs had ever raised to us in response to my  
10 multiple letters a reason why CVS should actually remain in  
11 the medical monitoring class action, we might not be here  
12 raising this issue. We don't want to waste the Court's time  
13 with these. But when we raise these issues of efficiency,  
14 we're not getting a response from plaintiffs.

15 So simply, you know, once Mr. O'Neill's medical  
16 monitoring claim was dismissed, there were simply no  
17 plaintiffs who asserted medical monitoring claims against CVS  
18 who filled at CVS.

19 We're not trying to raise a difficult issue or an  
20 issue that requires full-fledged briefing. We're not trying  
21 to raise merit or fact-based issues, but we would request that  
22 plaintiffs be ordered to show cause why CVS should not be  
23 dismissed from the medical monitoring complaint consistent  
24 with the procedure outlined in Your Honor's prior orders.

25 MR. STANOCH: Your Honor, if I may.

1 JUDGE VANASKIE: You may, Mr. Stanoch.

2 MR. STANOCH: Thank you, Judge.

3 We're only in this position, Your Honor, because we  
4 have assessed in good faith prior requests to dismiss prior  
5 named plaintiffs, which we ultimately did, which now we're  
6 seeing was a potential domino sandbag tactic to end up with  
7 certain other claims and defendants down the road potentially  
8 being dismissed.

9 Ms. Kapke says she's not arguing the merits. Well,  
10 they submitted a brief arguing law and facts to Your Honor in  
11 their CMC letter. This is not the appropriate time,  
12 procedurally or otherwise, to address these issues.

13 They will have over 100 pages of briefing on class  
14 cert. Nothing stops them from taking the two-and-a-half pages  
15 in their letter and putting it into their class cert brief, at  
16 the very worst.

17 So we don't think it's appropriate to address this  
18 now. There is no show-cause process on the class side. There  
19 never has been a show-cause process on this side. In fact, we  
20 think it's going to be inefficient to inject a side merits  
21 argument and discussion now when the parties are working so  
22 hard to depose, have Daubert hearings, and submit class  
23 certification briefing and everything else going on.

24 We've said we'll look at it. We are looking at it.  
25 We'll get back to Ms. Kapke with a response.

1 JUDGE VANASKIE: Anything else on this issue?

2 Ms. Kapke?

3 MS. KAPKE: No, thank you, Your Honor. I'll just  
4 reiterate that there is a lot of work, like Mr. Stanoch said,  
5 in being a part of a class action. And when we don't have any  
6 plaintiffs in the class action, it's really unfair, even under  
7 Rule 11, to force us to defend ourselves in the medical  
8 monitoring class action. And it's not an insignificant or  
9 insubstantial amount of work to be a part of that.

10 And so I think, you know, we appreciate plaintiffs'  
11 efforts in being efficient and going down this path of  
12 dismissing appropriate parties, but we do think that the order  
13 to show cause as was done initially makes sense.

14 Thanks, Your Honor.

15 JUDGE VANASKIE: Well, so far -- thank you very much.

16 So far it has been my experience, at least, that  
17 while it might take some time, but plaintiffs do ultimately  
18 make a decision on voluntary dismissal of individual  
19 defendants like CVS where there are no named plaintiffs that  
20 have asserted a claim against or have asserted a basis for a  
21 claim against a party like CVS.

22 Now, I know you'd like it to happen sooner. And I am  
23 sensitive to the fact that you may be incurring expenses and  
24 litigation fees as the matter continues to pend. But I'm not  
25 going to start the show-cause process at this time on this

1 matter.

2 Let's take it up again in a couple weeks when we have  
3 our next conference. Hopefully plaintiffs will have had  
4 enough time to consider the matter and take the appropriate  
5 action.

6 I won't rule out issuing a show-cause order, but I  
7 won't do it at this time. All right?

8 MS. KAPKE: Thank you. Thank you very much. I  
9 appreciate that.

10 MR. STANOCH: Thank you, Judge.

11 JUDGE VANASKIE: Thank you all very much.

12 Now, I think, other than the Daubert scheduling and  
13 Daubert process issues, there's nothing else for me to address  
14 at this time. Is that accurate?

15 MR. GOLDBERG: I think that's right from defendants,  
16 Your Honor.

17 MR. SLATER: I believe so, Your Honor.

18 JUDGE VANASKIE: All right. So let's see if we can  
19 get Judge Kugler on the phone.

20 Loretta, are you on the call?

21 I hear no response. I'm going to drop off this call,  
22 call Judge Kugler, who will then join us. All right?

23 Thank you.

24 (Recess at 10:22 a.m. until 10:26 a.m.)

25 JUDGE VANASKIE: Judge Kugler let me know that he

1 will be dialing in.

2 JUDGE KUGLER: Good morning, it's Judge Kugler. How  
3 is everybody?

4 RESPONSE: Good morning, Your Honor.

5 JUDGE SLEET: This is Judge Sleet. Could I just  
6 interrupt to ask a quick question if it's okay?

7 JUDGE KUGLER: Yeah.

8 JUDGE SLEET: Great. Judge Stengel has to leave the  
9 call shortly. We just wanted to check, Judge Kugler, to see  
10 if you expected to talk with us today afterwards or arrange  
11 another time.

12 JUDGE KUGLER: We can talk afterwards, Judge Sleet.  
13 If you want to talk this afternoon, that's fine. Whatever is  
14 convenient for you two.

15 JUDGE SLEET: We'll accommodate your schedule, Judge.  
16 You tell me.

17 JUDGE KUGLER: Well --

18 JUDGE SLEET: Judge Stengel is getting off to attend  
19 a mediation, so I'm not sure that I believe -- a Zoom event, a  
20 Zoom mediation all day, so I'm not sure that today would be  
21 the best day.

22 JUDGE KUGLER: Want to do it tomorrow morning?

23 JUDGE STENGEL: This is Judge Stengel. Tomorrow  
24 morning would be great. That would be great.

25 JUDGE SLEET: Let me quickly check, please, Judge,



1 hold on just a second.

2 Good for me as well.

3 JUDGE KUGLER: Hang on a minute. Let's see what  
4 we've got tomorrow. March 1st. Unbelievable. What the heck  
5 happened?

6 I am available -- let's see. I've got some things in  
7 the morning, phone and Zoom. How about 10:30? We'll set up  
8 something. Can we do it 10:30 tomorrow?

9 JUDGE SLEET: Good for me.

10 JUDGE STENGEL: Perfect. That's great.

11 JUDGE SLEET: Could Loretta send us a dial-in number,  
12 Judge?

13 JUDGE KUGLER: We'll get that to you.

14 JUDGE SLEET: Okay.

15 MS. SMITH: Would you prefer a Zoom, Judge Sleet and  
16 Judge Stengel? This is Loretta.

17 JUDGE SLEET: I think a Zoom would be better.

18 MS. SMITH: I'll be glad to send you -- I'll send you  
19 an invite.

20 JUDGE SLEET: Thank you. Thanks, Judges.

21 JUDGE KUGLER: Thank you, everybody.

22 Okay. We have some things to talk about this  
23 morning.

24 First, an update on the court, COVID. We are  
25 starting again back in with trials and all that stuff.

1 I think it looks like maybe in April we can start  
2 in-court proceedings if you have anything to schedule. So  
3 let's keep an eye on that.

4 Anyway, there are a number of orders to show cause  
5 type of things.

6 And Mr. Harkins, if you are on the phone, do you want  
7 to go through that?

8 MR. HARKINS: Yes. Good morning, Your Honor. This  
9 is Steve Harkins with Greenberg Traurig for Teva and the joint  
10 defense group.

11 Consistent with the first set of cases on our agenda  
12 statement, we are not requesting dismissal of any cases at  
13 this time. The issues in the Louissant matter are resolved,  
14 and that can be withdrawn. And we request that the Mills and  
15 Thorn matters be continued, returnable at the next case  
16 management conference while the parties continue to work on  
17 those issues.

18 JUDGE KUGLER: Okay. Louissant, that order to show  
19 cause will be dismissed. And the Mills and Thorn matter will  
20 be relisted for next time.

21 Now, you're seeking orders to show cause in six more.  
22 Any additions or changes on that?

23 MR. HARKINS: One update, Your Honor. The issues in  
24 the Robert Cook case, number one on our list, are resolved and  
25 that request is withdrawn. At this time we would request

1 orders to show cause returnable at the next case management  
2 conference for the other five cases: Martin, Whitfield,  
3 McCall, Harris, and Williams.

4 JUDGE KUGLER: Any plaintiffs' counsel want to be  
5 heard on this?

6 MS. OLIVER: Yes, Your Honor. This is Alyson Oliver  
7 on behalf of Tracy Whitfield.

8 Judge, we are working hard to try to resolve these  
9 deficiencies. We unfortunately have had some communication  
10 troubles with our client. But we're making progress and we  
11 would ask for an additional 30 days to get this done.

12 JUDGE KUGLER: Well, you'll have 30 days because the  
13 order to show cause won't be returnable until a month from  
14 now. So if you still have difficulties and you can't work it  
15 out with your adversary then I'll hear you at that point.  
16 Okay?

17 MS. OLIVER: All right. Thank you, Your Honor.

18 JUDGE KUGLER: Anybody else?

19 (No response.)

20 JUDGE KUGLER: All right. We'll issue orders to show  
21 cause on those five matters.

22 And then there are quite a few -- quite a few. 28  
23 that you find deficiencies in and you want to list again; is  
24 that right?

25 MR. HARKINS: Your Honor, we have two updates on that

1 table.

2 The issues have been corrected in number 11,  
3 Claudette Pelletier, and number 28, William Webb. We will not  
4 be relisting those. The remaining 26 cases, we would intend  
5 to provide a status listing for those at the next case  
6 management conference.

7 JUDGE KUGLER: Okay. Then the other 26 we'll see  
8 next time unless you work it out before then. Okay?

9 MR. HARKINS: Thank you, Your Honor.

10 JUDGE KUGLER: Any others on the list that you want  
11 to talk about, Mr. Harkins?

12 MR. HARKINS: Nothing further from the defendants.

13 JUDGE KUGLER: Okay.

14 The next item is the CVS issue, CVS.

15 Reading your papers, Mr. Goldberg, I understand your  
16 concerns. And they're legitimate. But the plaintiffs say  
17 they understand your concerns. They have voluntarily  
18 dismissed in the past and they just need some time to look  
19 this over.

20 So why don't we -- if it doesn't get resolved, why  
21 don't we talk about it next time. Okay?

22 MR. HARKINS: Thank you, Your Honor. I believe Judge  
23 Vanaskie made that ruling in the earlier call.

24 JUDGE KUGLER: Okay.

25 MR. GOLDBERG: Kara Kapke from CVS is on the line if

1 she has anything to add.

2 MS. KAPKE: Yes, Your Honor. We're fine with that  
3 procedure. This is Kara Kapke.

4 JUDGE KUGLER: All right. I read with interest the  
5 data breach. I'm not sure there's anything we can do about it  
6 at this point.

7 If it's any consolation to the plaintiffs who had  
8 their personal information breached, mine has been breached a  
9 number of times, including my entire personnel file from  
10 government service and all my medical records, credit card  
11 information and other breaches. It's not pleasant to go  
12 through, but it happens.

13 But I'm not so sure there's anything I can do. I  
14 imagine these plaintiffs may have a lawsuit. I don't know.

15 MS. LOCKARD: Your Honor, it's Victoria Lockard for  
16 the defendants in Greenberg Traurig.

17 Judge Vanaskie also addressed this. I think he was  
18 of a similar view. But in fact there is a lawsuit that has  
19 been filed already, so --

20 JUDGE KUGLER: Of course.

21 MS. LOCKARD: But we'll work with the plaintiffs.  
22 And, you know, Vanaskie had encouraged us to get a call on the  
23 books with Marker so that plaintiffs can get the information  
24 they're seeking. So we will work together to make that  
25 happen.

1 JUDGE KUGLER: Okay. Who wants to talk about the  
2 defendants' objections to the hearings that we're going to  
3 start this week?

4 MR. TRISCHLER: Your Honor, good morning, this is  
5 Clem Trischler.

6 I think I can speak to that issue on behalf of the  
7 defense group. I represent the Mylan entities.

8 JUDGE KUGLER: Okay. I have some questions for you,  
9 Mr. Trischler.

10 Do you acknowledge that you're not entitled to a  
11 hearing?

12 MR. TRISCHLER: I think that there is case law in the  
13 Third Circuit suggesting that a hearing is advisable and often  
14 warranted. I think that there is some discretion with the  
15 Court on that, so I won't sit here and tell the Court that I  
16 think in each and every instance, a Daubert -- a full Daubert  
17 hearing has to be permitted.

18 JUDGE KUGLER: Do you want to cite a case to me that  
19 says that?

20 MR. TRISCHLER: I can't cite one off the top of my  
21 head, Your Honor, but I'd be happy to look while we -- have  
22 someone look while we speak and perhaps by the time we're done  
23 provide you with case law. But I believe there's certainly  
24 case law out there that I've seen that indicates that where  
25 requested, a hearing is recommended.

1 JUDGE KUGLER: Well, no case says it's recommended.  
2 I'll go through them right now.

3 First of all, we start with Kumho, K-U-M-H-O, Tire,  
4 the Supreme Court case which said it's really discretionary  
5 with the trial court.

6 The first real Third Circuit case that said anything  
7 about this was Padillas, P-A-D-I-L-L-A-S, which is at 186 F.3d  
8 417. It's a Third Circuit case from 1999 which said that a  
9 hearing is not required whenever a Daubert objection is raised  
10 to proffered expert testimony. But the Third Circuit reversed  
11 and sent that one back, said there should have been more in  
12 that case, but those are a little unusual. That was a product  
13 liability machine guarding case in which the defendant moved  
14 for summary judgment. The plaintiff's response consisted of  
15 a -- what the Court referred to as a scant and conclusionary  
16 expert report. And the trial judge in that case looked at the  
17 expert report and said there was really no methodology to  
18 this, chunked the report, granted summary judgment.

19 The Third Circuit said, well, you should have really  
20 gotten more -- given the plaintiff more of an opportunity to  
21 explain their side of the case before you grant summary  
22 judgment. Okay.

23 But then you had Oddi, O-D-D-I, v. Ford Motor  
24 Company, 234 F.3d 136, in which the plaintiff again said they  
25 were denied the right to a Daubert hearing. The Third Circuit

1 noted that the district court already had before it the  
2 depositions and affidavits of plaintiffs' experts. Nothing  
3 else was required. That was Judge McKee.

4 And then in Henry v. St. Croix, 572 F.App'x 114, the  
5 court noted that no hearing was necessary in that case because  
6 the record in that case was immense.

7 So let's go through what we have here, Mr. Trischler.  
8 You received all these expert reports timely.  
9 Correct?

10 MR. TRISCHLER: Yes. We received expert reports from  
11 the five general causation witnesses that the plaintiffs have  
12 identified, Your Honor.

13 JUDGE KUGLER: And you took their depositions.  
14 Correct?

15 MR. TRISCHLER: We did.

16 JUDGE KUGLER: And no one prevented you, other than  
17 the standard objections, from asking any questions you wanted  
18 of those five experts, did they?

19 MR. TRISCHLER: I haven't been through each and every  
20 deposition. I don't recall them all. I'm sure there were  
21 objections to questions, but there was no -- we certainly had  
22 an opportunity to raise those objections with the Court if we  
23 so desired.

24 JUDGE KUGLER: Each of those transcripts is hundreds  
25 of pages. Correct?



1 MR. TRISCHLER: That is true.

2 JUDGE KUGLER: So the defendants had a full and fair  
3 opportunity to question each of the plaintiffs' experts.  
4 Correct?

5 MR. TRISCHLER: On that issue, Your Honor, I take  
6 some issue with it, because one of the issues that we found  
7 and one of the reasons why I think an evidentiary hearing is  
8 extremely important is that a number of the witness were quite  
9 evasive in their depositions. We saw a lot of long-winded  
10 answers that were designed to evade the questions that were  
11 being asked and to prevent the presentation of a clear record.

12 That's why on many occasions, including one witness  
13 that I can recall in particular, Dr. Panigraphy, we had to go  
14 to court in front of Special Master Vanaskie and ask for more  
15 time to depose the witness, because we couldn't get  
16 straightforward answers to questions. And we were given more  
17 time.

18 But there's quite a difference between being able to  
19 ask questions in deposition in an evidentiary hearing in front  
20 of Your Honor, where we can get direct answers to the key  
21 questions in this case that need to be answered. And the key  
22 question obviously is whether the small amounts of  
23 nitrosamines that were found in valsartan-containing  
24 medications are capable of causing cancer. I think an  
25 evidentiary hearing has a great value. And now that we're

1 seeing the declarations, you know, we simply do not believe,  
2 with all due respect, that the procedures that have been put  
3 in place for the upcoming Daubert hearing are conducive to a  
4 full development of the record.

5 JUDGE KUGLER: Mr. Trischler, let's go back to the  
6 question I asked. How about that?

7 MR. TRISCHLER: Sure thing, Your Honor.

8 JUDGE KUGLER: You had a full and fair opportunity to  
9 ask these experts whatever you wanted to ask them. And if you  
10 needed the assistance of the Court, that was available.  
11 Correct?

12 MR. TRISCHLER: That's correct. And we availed  
13 ourselves of that assistance when necessary.

14 JUDGE KUGLER: Now, then you collectively filed  
15 timely your motions to bar their testimony of these experts.  
16 Correct?

17 MR. TRISCHLER: Yes.

18 JUDGE KUGLER: And no one prevented you, in filing  
19 your motions, from raising any issue you thought this Court  
20 should be aware of regarding the testimony of these experts.  
21 Correct?

22 MR. TRISCHLER: We raised challenges to each of the  
23 general causation experts asserting the legal bases upon which  
24 we believe their testimony to be inadmissible. Yes, sir.

25 JUDGE KUGLER: So you selected the grounds upon which

1 your motions rest. Isn't that right?

2 MR. TRISCHLER: Yes. No one else selected them for  
3 us.

4 JUDGE KUGLER: And collectively, the opening briefs,  
5 the reply brief, the exhibits, attachments, thousands and  
6 thousands of pages. Correct?

7 MR. TRISCHLER: I've not counted, Your Honor, but  
8 that's -- I don't take issue with the page count. And that's  
9 because of the significance -- the undeniable significance and  
10 importance of this issue to this litigation. Each of these  
11 experts filed reports that are hundreds of pages long, that  
12 purport to assert various reasons why their general causation  
13 testimony is reliable and supported by good scientific  
14 grounds. There's a lot of work that goes into evaluating that  
15 issue, a lot of questions that need to be answered.

16 So yes, there was a lot of paper. And we certainly  
17 believe that an evidentiary hearing and argument on these  
18 issues will further help the Court in working its way through  
19 these -- this somewhat complicated issue that has been briefed  
20 in thousands and thousands of pages.

21 JUDGE KUGLER: Then you had the opportunity to  
22 present declarations on behalf of each of your experts.  
23 Correct?

24 MR. TRISCHLER: The Court did provide that  
25 opportunity. I don't think that goes necessarily to the issue

1 of what methodologies the plaintiffs' experts relied upon and  
2 whether their experts have a good scientific basis for their  
3 opinions, but the Court did allow an opportunity to supplement  
4 the record through depositions, absolutely. Or through  
5 declarations.

6 JUDGE KUGLER: Having read all these declarations  
7 that you and the plaintiffs did precisely what the opportunity  
8 presented you with, which was to clear up what might have been  
9 some lingering questions as a result of the briefing and the  
10 fact that the depositions were done before the briefing was  
11 done. But nobody restricted anybody's ability to exempt any  
12 declaration from any expert on any subject. Correct?

13 MR. TRISCHLER: Well, Your Honor, the issue -- the  
14 issue that I see with the supplemental declarations, in  
15 listening to what Your Honor has suggested as far as how you  
16 foresee the hearings proceeding later this week, is that the  
17 experts are going to be -- any examination of the experts is  
18 going to be limited to what's in their supplemental  
19 declarations.

20 So in the case of the five plaintiffs' witnesses,  
21 there have been -- there's two who submitted no declaration.  
22 So in effect, there's -- two of the five general causation  
23 witnesses relied upon by the plaintiffs are shielded from any  
24 hearing --

25 JUDGE KUGLER: Well, that's not true. That's not

1 correct at all. You had hundreds of pages of deposition  
2 testimony of those too. If you had any other questions to ask  
3 them, you certainly could have done so. You had the  
4 opportunity, didn't you?

5 MR. TRISCHLER: We had the opportunity to depose  
6 them, Your Honor. I simply disagree that the deposition ought  
7 to be the sole basis upon which to evaluate the reliability of  
8 expert testimony.

9 JUDGE KUGLER: Well, it's not the sole basis. I also  
10 have the reports and the extensive briefing. So how can that  
11 be the full basis for me to make a decision?

12 MR. TRISCHLER: I don't see the harm in -- on an  
13 important issue like this in compelling the proponent of the  
14 expert testimony to bring the witness in so that that witness  
15 can be cross-examined in front of the Court so that we can  
16 present other evidence beyond just cross-examination,  
17 including testimony from other witnesses, to talk about why  
18 that testimony is not relevant, doesn't meet the standards for  
19 admissibility under Rules 702 and 703.

20 I don't see -- I don't see the harm in that, Your  
21 Honor. Certainly, yes, we've had an opportunity to take a  
22 deposition and to ask any question that we wanted. But I  
23 don't believe the deposition should be -- should preclude  
24 further analysis or further scrutiny of the testimony of these  
25 witnesses.

1 JUDGE KUGLER: Mr. Trischler, right now, in some of  
2 the letters that were submitted to the Court, you say that you  
3 want the opportunity to present other evidence. But you've  
4 done that, haven't you? Your experts have commented  
5 extensively on the plaintiffs' experts, haven't they?

6 MR. TRISCHLER: Yes, they do in their reports, Your  
7 Honor.

8 JUDGE KUGLER: Have any material facts changed since  
9 you submitted these briefs?

10 MR. TRISCHLER: Well, I would say no, because there  
11 was no scientific basis for the opinion testimony to begin  
12 with and there hasn't been any offered since, so in that  
13 sense, no.

14 JUDGE KUGLER: Has there been any change in the law  
15 since you submitted these thousands of pages of briefing and  
16 exhibits?

17 MR. TRISCHLER: No. The Court is -- the Court's  
18 gatekeeping responsibility hasn't changed, and the standard  
19 for the admissibility of that testimony has not changed.

20 JUDGE KUGLER: Are you somehow claiming that you or  
21 any of the defendants were deprived of an opportunity to  
22 present to this Court whatever you wanted this Court to know  
23 regarding these experts?

24 MR. TRISCHLER: What I'm suggesting -- what I'm  
25 trying to suggest, Your Honor --

1 JUDGE KUGLER: Mr. Trischler, is that a no or a yes?

2 MR. TRISCHLER: What I'm trying to suggest, Your

3 Honor --

4 JUDGE KUGLER: Mr. Trischler, is that a no or a yes?

5 MR. TRISCHLER: It's a "no" in the sense that I  
6 believe a hearing with an opportunity to further develop the  
7 record would be -- would be the fairest approach to -- for the  
8 Court to follow and provide an opportunity to more fully  
9 develop the record on this important...

10 JUDGE KUGLER: So all I've heard and all I've read,  
11 two letters, was that defendants want an opportunity to  
12 develop the record when they spent months and thousands of  
13 pages doing so, and cannot tell me what it is that they missed  
14 that isn't there. There seems to be this theory that if they  
15 put on this theatrical production with these witnesses,  
16 somehow I'm going to come to like one side's witnesses over  
17 the other. That's not my job. That's not what the Supreme  
18 Court or Third Circuit have told me to do.

19 I think there's a tremendous misunderstanding here of  
20 the purpose of Daubert hearings on these Daubert motions.

21 They've become ubiquitous in the practice of law.  
22 And I see them now in every case that I have.

23 I think this goes well beyond -- this practice goes  
24 well beyond the contemplation of the Supreme Court or the  
25 rules committee when they drafted 702 and amended 702.

1           And I've got to tell you, having read and considered  
2 hundreds of these motions, the vast majority of them are not  
3 well thought out. In fact, I question why some of these  
4 motions are even brought.

5           Some of these experts are so weak that tactically I  
6 think counsel who are opposing these experts would be better  
7 off just letting them testify and then cross-examining them  
8 into oblivion.

9           But I get it. No one takes a civil case to a jury  
10 trial anymore so all the action now are in these pretrial  
11 skirmishes. I get it.

12           But let's talk about Daubert. I've talked about this  
13 a little bit before. I want to talk about it and tell you a  
14 little bit more where we're going with this. I don't want  
15 there to be any surprises where we're going with this.

16           Now, I'm old enough to have practiced law under the  
17 old Frye, F-R-Y-E, standard in which the proponent had to show  
18 that the opinion was generally accepted in the relevant  
19 scientific community.

20           And that didn't work out so well, because, you  
21 know -- I don't want to go into the history of this, but you  
22 had all these cancer cluster cases around landfills and  
23 Superfund sites and industrial sites. And there were no  
24 studies whatsoever that would make the linkage. So the people  
25 who claimed to be injured as a result of those exposures had



1 no ability to seek compensation.

2 So they changed the rules. The Supreme Court came  
3 out with Daubert, which would permit novel scientific  
4 testimony on three conditions. One was qualifications. Well,  
5 that's really never an issue. It's not an issue in this case.

6 Another one was what the former Chief Judge and the  
7 late Ed Becker used to call fit or relevance. Don't see much  
8 of those anymore.

9 But there's this intense focus on methodology now, to  
10 make sure that these opinions being generated, given by these  
11 so-called experts are arrived at the same way good scientists  
12 would arrive at their opinions.

13 But you got to understand that Daubert is not --  
14 Daubert is not a dress rehearsal for trial. And the Court, as  
15 I've said previously, has an extremely limited role. And my  
16 role is not to pick which side has the better witnesses.

17 MR. TRISCHLER: Your Honor --

18 JUDGE KUGLER: The gatekeeper function that I have  
19 and district courts have is very circumscribed by the Supreme  
20 Court and the Third Circuit. It's not to weed out weak  
21 science, it's to weed out what some people have called junk  
22 science, that is, science which no reasonable scientist could  
23 ever support.

24 And I'll remind you what the Supreme Court wrote in  
25 Daubert. This is at page 152.

1           Vigorous cross-examination, presentation of contrary  
2 evidence and careful instruction in the burden of proof are  
3 the traditional and appropriate means of attacking shaky but  
4 admissible evidence.

5           Notice the use of the word "shaky."

6           What Judge McKee wrote in the Oddi, O-D-D-I, v. Ford  
7 Motor case: That the analysis of the conclusions themselves  
8 is for the trier of fact where the expert is subject to  
9 cross-examination. And the evidentiary requirement of  
10 reliability is lower than the merits standard of correctness.  
11 The standard for determining scientific reliability of a  
12 proffered expert is not that high. The test is not whether  
13 the expert might have done a better job. That's at 234 F.3d  
14 155.

15           Now, look, I get it. Here almost all the experts on  
16 both sides have some weaknesses. The fact remains that pretty  
17 much all of them use the same general methodology, which is  
18 review of the relevant literature. They went over it in the  
19 beginning of their reports. It's all there. And you  
20 questioned them extensively about it.

21           All of them agree that human clinical trials are not  
22 possible. It's unethical. But they all looked at animal  
23 studies and observational studies, statistical analyses and  
24 all that kind of stuff. And this is what scientists do. Then  
25 they chose which of the data they felt is most important and

1 which is less so, which everyone on both sides refers to as  
2 cherry-picking, you know. And the defendants rely on the  
3 Pottegard, P-O-T-T-E-G-A-R-D; and Goom, G-O-O-M; Yoon,  
4 Y-O-O-N; and other studies. The plaintiffs place a lot of  
5 stock in Hidajat, H-I-D-A-J-A-T.

6 But the point is they all use the same methodology.  
7 They just gave different emphasis to different things. And  
8 this is a methodology that is clearly accepted by all the  
9 scientists in the field.

10 Now, look, I know, and you've cited the cases where  
11 there are some judges around the country who have done a deep  
12 dive and drilled down into all these studies to look at the  
13 underlying data. And then they pick which size and which  
14 studies they think are the more reliable and the consequences  
15 that has for an expert's opinion. That is not my job, folks,  
16 and I'm not doing that. That's not what the Supreme Court and  
17 the Third Circuit have told me that I have to do.

18 All these expert reports have weaknesses which you,  
19 all of you, have done a great job pointing out.

20 But again, as the Supreme Court and the Third Circuit  
21 have said, my concern is not weak opinions or opinions that  
22 might be better. I'm not going to make any determination.  
23 This is not a dress rehearsal, which side has the better  
24 witnesses. I'm not going to make any determination as to the  
25 relative strengths of the witnesses or the underlying data.

1           Take, for example, that these animal studies that  
2 everybody talks about. No question they're fraught with  
3 danger when you're trying to extrapolate into humans.  
4 Everybody knows that.

5           But those scientists I'm aware of who completely  
6 disregard an animal study, that's not what they do. They all  
7 look at them and draw whatever conclusions they think are  
8 appropriate for the reasons that they give.

9           And the Hidajat study we just talked about,  
10 defendants are right. There are some problems with that  
11 study. It's inhalation, it's not ingestion. It doesn't  
12 control for other factors that can cause cancer, like smoking.  
13 Pointing out their strengths, it's a lot of people over a long  
14 time, 47 years or something. It's not up to me to determine  
15 whether or not these studies are appropriately considered,  
16 because I'm focusing on the way they came to their opinions.  
17 And scientists come to their opinions by looking at studies.

18           So I'm not going to be focusing on that. I'll be  
19 focusing on the methodology. I don't care what the  
20 conclusions are. I don't care whose side it benefits. I just  
21 want to know -- and it's laid out in the depositions. It's  
22 laid out in the reports. It's laid out, I think, for the most  
23 part in these declarations as to how they got where they got.

24           So on Wednesday, that's all we're going to talk  
25 about.

1 All right. Now, what time are we starting Wednesday?

2 MR. SLATER: Hello, Your Honor. This is Adam Slater.

3 We thought we would seek Your Honor's guidance on that.

4 We're ready to start, if you want to start at 9:00,  
5 9:30, 10:00, whatever you want to do. We'll be ready to begin  
6 at that time.

7 JUDGE KUGLER: 9:30. Who is first?

8 MR. SLATER: First will be Dr. Lagana.

9 JUDGE KUGLER: Lagana. Then what's the order?

10 MR. SLATER: Our plan is for Dr. Lagana, then  
11 Dr. Panigraphy, and then Dr. Etminan. And the reasoning  
12 behind that was because Dr. Etminan is in British Columbia, so  
13 we thought it would be harder for him to testify first in the  
14 morning.

15 JUDGE KUGLER: I don't really care.

16 MR. GOLDBERG: Your Honor, this is Seth Goldberg for  
17 the defendants.

18 In terms of Dr. Etminan, we may have a scheduling  
19 conference or a scheduling conflict -- in fact, we do -- that  
20 afternoon. The lawyer who is going to be doing the  
21 cross-examination has a hearing in another matter. We've  
22 raised that with plaintiffs this morning. We're hoping we can  
23 work it out with plaintiffs, that we either get Etminan on in  
24 a different order or if Your Honor would indulge us to have a  
25 half hour break that afternoon so that hearing can be

1 attended, that would be appreciated. But we're hoping we can  
2 work this out with plaintiffs.

3 JUDGE KUGLER: Well, if the plaintiffs want to shift  
4 the order, that's fine. If you need a half an hour break,  
5 that's fine too. We can work that out. I'm not worried about  
6 that.

7 MR. GOLDBERG: Thank you, Your Honor.

8 JUDGE KUGLER: We'll get them all done on Wednesday.

9 Now, the defendants have told me -- I don't  
10 understand this, to be honest with you -- that they are going  
11 to have Bottoroff, B-O-T-T-O-R-O-F-F, on March 15th and  
12 Johnson on March 29th. That's rejected. Nobody is testifying  
13 on March 29th. You've known for months when these dates are.  
14 That your witnesses can't figure it out is not my problem. I  
15 don't adjust my schedule for witnesses. I don't care who he  
16 thinks he is. He thinks he's a pretty hot shot too, reading  
17 his deposition.

18 But here's what I'm going to let you do. I don't  
19 care when he testifies. You can work that out. I don't have  
20 to attend this. I don't know what this big thing is that  
21 somehow I need to see these people and hear what they say  
22 live.

23 I've been a judge a long time and a lawyer even  
24 longer. In the course of my life and career, I've probably  
25 read thousands of expert reports. I can pretty much figure

1 out who's testifying for plaintiff and who's testifying for  
2 the defendant. So this skirmishing about who went first and  
3 when, this is pure, utter nonsense to me and was an affront to  
4 me that somehow unless we had the schedule in place, I would  
5 be confused.

6 Folks, I know who is the plaintiff's side, and I know  
7 who the defendants' side is.

8 So it's rejected. So long as I have a transcript of  
9 Johnson by March 14th, that's fine. I'll read the transcript,  
10 if in fact the plaintiffs still want to question the guy. I'm  
11 not sure they will, but that's up to them. That's the deal.  
12 Okay?

13 I mean, there's an order in place. I've told you  
14 repeatedly what the dates are. Figure it out, folks. You're  
15 all very accomplished lawyers.

16 All right. Anything else on the agenda we want to  
17 talk about today?

18 MR. SLATER: I don't believe so for plaintiffs, Your  
19 Honor.

20 MR. GOLDBERG: Nothing for defendants, Your Honor.

21 JUDGE KUGLER: All right. Let me spend a few minutes  
22 with you then talking about where I foresee we're going with  
23 this.

24 These motions will be decided, these Daubert motions  
25 are all going to be decided by the middle of March. They will

1 be all done.

2           Where do we go from here? I guess the next thing up  
3 are the class certification motions. And we'll do those,  
4 according to the schedule, in May. That's fine.

5           But I don't see, frankly, that anything else should  
6 be dependent on the outcome of those class action motions. I  
7 mean, those individuals or organizations either have a claim  
8 individually or a claim as part of a class. So they're not  
9 going to go away depending on the outcome of the motions. But  
10 I understand they're important, and we'll take care of them.

11           Then I foresee that there might be some summary  
12 judgment motions. There's still some legal issues out there,  
13 because some of these state laws are at play here and, you  
14 know, some states don't support certain causes of action and  
15 all that stuff. We dealt with some of that in the motions to  
16 dismiss, but there's probably some cleanup to do there.

17           But I will urge that the parties talk to each other,  
18 because, I mean, some of those legal issues are pretty clear  
19 and perhaps you can come to some kind of stipulation and not  
20 have to file a lot of papers.

21           Okay. So they're going to come. And there's no  
22 reason we have to wait for those to be filed.

23           And then we've talked about bellwether cases. Not my  
24 favorite things to do in the world, but there are. I'm not a  
25 big fan of them. I don't think they do much good, but, you



1 know, we'll try them. But, you know, they can be the best of  
2 a lot of bad options in a case.

3 But I want to repeat something I said at the  
4 beginning of all this. I am not going to be trying any  
5 personal injury bellwether weather cases.

6 The personal injury cases are just too idiosyncratic  
7 for us to get the answer to the first and most important  
8 questions here, which is general causation. So we'll pick a  
9 case if we have to, probably a third-party payor case because  
10 the damages are relatively easy to calculate in those cases,  
11 and just to get a jury to say yes or no on the question of  
12 general causation and get that done.

13 I think the bottom line I'm trying to tell you,  
14 lawyers, is that I expect that my role in this will be done by  
15 the end of this year. And the logistics of that are that once  
16 I'm done what I can do is I notify the MDL panel that I'm done  
17 and request that they send the cases back where they came from  
18 or where they should have been originally filed but for the  
19 direct filing order. And they generally do that.

20 But that means, of course, that we lose one of the  
21 benefits of this being an MDL, that is, all of us together,  
22 all of you together in this case.

23 And you're going to be faced with the prospect now of  
24 simultaneous litigation in dozens and dozens of jurisdictions.  
25 There will be some cases remaining in the District of New

1 Jersey. Well, they'll be distributed around the district  
2 also.

3 Of course, once the MDL part of this is done, what  
4 you're going to see -- because we've seen this in all these  
5 cases around the country, is you're going to find some hot  
6 shot plaintiff's lawyer convincing some state court judge to  
7 try some case, one of these cases, because he or she thinks  
8 they're going to get a big, broad -- big number and make a  
9 name for themselves. And there's no way that can be stopped.  
10 We've been lucky that the state courts have been deferring to  
11 us, the federal system, while we manage this mess. But once  
12 I'm done, all bets are off for that.

13 So, you know, the MDL process has problems. And I  
14 understand the defendants' complaints about this. And I  
15 agree, frankly, and I've said this publicly, that the MDL  
16 process benefits well prepared plaintiffs. And in this case  
17 you have well prepared plaintiffs.

18 But I didn't invent this system. I didn't pass these  
19 laws or rules. I just have to enforce it.

20 And here's an observation I've made many times in  
21 public. I think the plaintiffs' bar is much better organized  
22 in these MDL cases than the defense bar. We don't have to  
23 talk about the reasons. But they just are. I think they  
24 figured it out a lot sooner than the defense bar has. So the  
25 MDL process surely benefits them. There's no doubt about it.

1 But that's the way it is and that's what we have to deal with.

2 So I guess what I'm saying is once these Daubert  
3 motions are decided in a couple weeks, there's really no  
4 impediment to people starting to get serious to try to resolve  
5 these cases. You know, the cert, class cert motions and  
6 things like that are no impediment to resolution because  
7 people will still have the claims whether they're an  
8 individual or part of a class.

9 So as long as we have this economy of scale, this  
10 mass of people together, I think you really need to start  
11 focusing on resolution of this.

12 And I'm going to tell Chief Judges Sleet and Stengel  
13 to begin aggressively scheduling some sessions.

14 I'm going to suggest to him, to them, that perhaps  
15 they want to focus on the retailers as the group.

16 Now, I know -- look, I know, you retailers have  
17 defenses, unique defenses. You've got the innocent seller  
18 defenses. And I'm sure that there are indemnity agreements  
19 all over the place here.

20 But you see, the plaintiffs know that too. And I've  
21 got to think the plaintiffs are going to be pretty reasonable,  
22 given that. And the indemnity agreements, well, you can  
23 settle the case and still chase your indemnitors. I mean, I  
24 don't know, I haven't looked at the law lately, but it used to  
25 be that so long as you put you indemnitor on notice and the

1 number was reasonable, they would be stuck with the number and  
2 you get the money back from them.

3           So I'm going to tell them -- and I'll talk to them  
4 tomorrow as you know, because you heard, that that's what I'd  
5 like them to start doing. And then maybe they can move on to  
6 the wholesalers, because there's only a few of them.

7           But my feeling is that, you know, you spend some -- I  
8 would think the retailers would want to get out from under  
9 this, because it's going to take some time and a lot of effort  
10 to assert these defenses and succeed on them.

11           And if the plaintiffs are reasonable, as they should  
12 be with that class of people, then perhaps some of these  
13 settlements wouldn't even be so significant that they're  
14 material enough to be brought to the SEC in the quarterly and  
15 annual reporting. But we'll see how they make out.

16           I know some of you are saying, oh, the end of the  
17 year, that's crazy.

18           Well, if you doubt that can happen, talk about the  
19 lawyers who went through Benicar. They had very aggressive  
20 scheduling in Benicar. And they stepped up to the plate, and  
21 they got it done. And I expect and I anticipate, given the  
22 quality of lawyers we have in this case, that you'll step up  
23 to the plate and we're going to get this thing done, this MDL  
24 done by the end of the year. And we'll see what happens after  
25 that.

1           Okay. I've spoken enough today. I want to wish you  
2 all well, stay healthy, and hopefully we will see you in April  
3 in the courthouse if we need to do it. It may not be enough  
4 on the agenda to justify April or May, but we'll see how it  
5 is. And I'll talk to you soon.

6           Thank you, everybody.

7           (Proceedings concluded at 11:10 a.m.)

8

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10           I certify that the foregoing is a correct transcript  
11 from the record of proceedings in the above-entitled matter.

12

13           /S/ Ann Marie Mitchell, CCR, CRR, RDR, RMR  
14           Court Reporter/Transcriber

15           28th day of February, 2022  
16           Date

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